LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U. S.
FILED
APR 18 1951
CHARLES ELMORE CROPLEY
CLERK

No. 632

In the Supreme Court of the United States

OCTOBER TERM, 1950

PETER ALFONS BINDCZYCK, PETITIONER

v.

THOMAS G. FINUCANE, INDIVIDUALLY AND AS CHAIRMAN OF THE BOARD OF IMMIGRATION APPEALS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Discussion	8

CITATIONS

Cases:

Baumgartner v. *United States*, 322 U. S. 665	14
Bronson v. *Schulten*, 104 U. S. 410	9
Eddy v. *Summers, et al.*, 183 Md. 683	9
Harvey v. *Slacum*, 181 Md. 206	9
Hazel-Atlas Co. v. *Hartford Co.*, 322 U. S. 238	9
Hoage v. *Murch Bros. Const. Co.*, 50 F. 2d 983	14
Jackson v. *Irving Trust Co.*, 311 U. S. 494	9
Knauer v. *United States*, 328 U. S. 654	14
Macoluso's Naturalization, 237 Pa. St. 132	10, 14, 19
Maney v. *United States*, 278 U. S. 17	14
Meister v. *Moore*, 96 U. S. 76	14
North v. *Town Real Estate Corp.* 60 A. 2d 665	9
Schneiderman v. *United States*, 320 U. S. 118	9, 14
Shelton v. *Van Kleeck*, 106 U. S. 532	9
Sourino v. *United States*, 86 F. 2d 309	12
State ex rel. Lacy v. *Broadhorst*, 156 Mo. 457	9
Tinn v. *United States District Attorney*, 148 Cal. 773	10
Tutun v. *United States*, 270 U. S. 568	8
United States v. *Aakervik*, 180 Fed. 137	12
United States v. *Norsch*, 42 Fed. 417	9
United States v. *Ginsberg*, 243 U. S. 472	14
United States v. *Kiriaze*, 172 F. 2d 1000	14
United States v. *Kornmehl*, 89 Fed. 10	9
United States v. *Mansour*, 170 Fed. 671	9
United States v. *Ness*, 245 U. S. 319	12
United States v. *Ovens*, 13 F. 2d 376	12
United States v. *Stabler*, 169 F. 2d 995	14
United States v. *Sotis*, 131 F. 2d 783	14
United States v. *Watkins*, 168 F. 2d 883	14
United States ex rel. Harrington v. *Schlotfeldt*, 136 F. 2d 935, certiorari denied, 327 U. S. 781	14
United States ex rel. Volpe v. *Jordan*, 161 F. 2d 390	14, 17, 19
United States ex rel. Volpe v. *Smith*, 62 F. 2d 808, affirmed, 289 U. S. 422	15
Volpe v. *United States*, 328 Ill. App. 311, 393 Ill. 630	16
Weitzien, Petition of, 68 F. Supp. 1000	11, 19
Whiting v. *Bank of United States*, 13 Pet. 6	9

Statutes:

	Page
Act of June 29, 1906, Sec. 15, 34 Stat. 596, 601	3, 10, 13
Nationality Act of 1940, 54 Stat. 1137:	
Section 335, 8 U.S.C. 735	8
Section 338, 8 U.S.C. 738	2, 13

Miscellaneous:

Ann. Cas. 1914B, 229-230	10
H. Doc. No. 326, 59th Cong., 2d sess., pp. 131-135	13
H. Rep. No. 1789, 59th Cong., 1st sess., pp. 2-3	13

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 612

PETER ALFONS BINDCZYCK, PETITIONER

v.

THOMAS G. FINUCANE, INDIVIDUALLY AND AS CHAIRMAN OF THE BOARD OF IMMIGRATION APPEALS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

OPINION BELOW

The opinion of the Court of Appeals (R. 23-32) is reported at 184 F. 2d 225.

JURISDICTION

The judgment of the Court of Appeals (Clark, Miller, and Proctor, JJ.) was entered on June 19, 1950 (R. 33), and a petition for rehearing before the full court (R. 34-44) was first denied by

the same panel on September 28, 1950 (R. 45). The order denying the petition was vacated by the court *sua sponte* on November 21, 1950 (R. 47), and on December 21, 1950, the petition for rehearing was denied by the court *en banc* (R. 48). The petition for a writ of certiorari was filed on March 15, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in enacting Section 338 of the Nationality Act of 1940 governing proceedings for denaturalization, Congress intended to make such a proceeding exclusive, so as to abridge the inherent and historical power of a court of record to vacate and set aside for good cause and after a hearing, its own naturalization decree issued within the same term of court.[1]

STATUTE INVOLVED

Section 338 of the Nationality Act of 1940, 54 Stat. 1137, 1158, 8 U.S.C. 738, provides in pertinent part as follows:

(a) It shall be the duty of the United States district attorneys for the respective

[1] Petitioner asserts that if this question is answered in the negative, the case also presents a question whether the order of the state court vacating its order admitting petitioner to citizenship "was void under the Constitution, Section 8, clause 4, and the Fifth and Fourteenth Amendments" (Pet. 2). He does not argue this question, however, and furthermore his complaint in the District Court was based solely upon his contention that Section 338 of the Nationality Act provides the exclusive method for revoking a naturalization decree (R. 5-6).

districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

(b) The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.[2]

STATEMENT

On December 2, 1943, petitioner, a German immigrant, while a soldier in the United States Armed Forces stationed at Camp Ritchie, Maryland, filed a petition for naturalization, and, after

[2] These provisions are a re-enactment in substantially the same terms of Section 15 of the Act of June 29, 1906, 34 Stat. 596, 601.

testifying under oath at the naturalization proceedings that, among other things, he believed in the form of Government of the United States and was willing to bear arms against all its enemies, was admitted, on the same date, to United States citizenship by order of the Circuit Court of Frederick County, Maryland, and was issued a certificate of naturalization by that court (R. 17-19, 23).

On December 3, 1943, after learning that he had received a promotion and had been alerted for overseas duty (R. 12-16), petitioner made statements to the Post Intelligence Officer disclaiming his loyalty to the United States, and also stated that he was unwilling to bear arms for this country and did not desire to remain here after the war was over (R. 14-15). On December 9, 1943, seven days after petitioner's naturalization, and within the same term of the Circuit Court, the United States Naturalization Examiner, on behalf of the United States, filed in the naturalization proceeding a motion to vacate the order of December 2 admitting petitioner to citizenship (R. 13; see also R. 23-24). The same day, notice of this motion was served on petitioner, who was then under military arrest (R. 17, 24). A special hearing on the motion was had on the same day (R. 13-19), at which petitioner admitted that when he testified under oath during the naturalization proceeding that he approved of this Government and would

fight for this country, he "swore falsely" (R. 18-19). Petitioner testified, in part, as follows (R. 18-19):

Q. This affidavit clearly sets forth your opinion, is that correct?

A. Yes.

Q. You do not wish to change that statement in any way?

A. Could I read it once more, please? (Referring to paper marked Exhibit B.) When I said here that—"and wish to go back to Germany after the war," I supposed that Germany will have a different government, and not the same Nazi government.

Q. That is presumed to be true, but the affidavit sets forth your feelings that you do wish to return to Germany, is that correct?

A. Not necessarily. I have my choice. I mean if I don't want to fight for this country I can't expect to remain in this country, and the country I came from is Germany. That is why I mentioned Germany here.

Q. You definitely do not wish to fight for the United States, is that correct?

A. No, that is correct.

Q. When you were here on December 2, 1943 and filed your petition, did you feel the same way at that time?

A. Yes.

Q. How long before had you felt that way?

A. I have felt that way for several weeks, but I mean it just didn't pop up that way.

Q. You felt that way when you came in here and filed the petition on the morning of December 2, 1943, is that correct?

A. Yes.

Q. (The Court) Did I understand you to say you did swear that you approved of this Government and that you would fight for this country?

A. While I was in Court here, yes, sir.

Q. You were swearing falsely at that time?

A. Yes, sir.

Q. (Mr. Cook [Naturalization Examiner]) Is there anything further you wish to say in this matter?

A. Well, the reason why I swore falsely is because that some people have had me before and while I was an alien, and I figured that these people were nice people and I didn't want to bring them any trouble. While I was an enemy alien, I figured being I was made a citizen would sort of break up the connections between these people and me, because in a way they were sponsors for me, because one of the witnesses who was my sponsor and many other people signed statements about me, about my character and so on.

Q. (The Court) Is that all?

A. Yes, sir.

At the conclusion of the hearing on December 9, 1943, the Circuit Court entered an order reciting that its order of December 2 admitting petitioner to citizenship "is hereby vacated and set aside,

and restored to the pending calendar for immediate hearing," and that "the original and duplicate certificate of naturalization * * * be voided and returned to the Immigration and Naturalization Service" (R. 19-20).

On June 15, 1948, while in custody of the Department of Justice after having been ordered deported, petitioner filed in the District Court for the District of Columbia a complaint praying for a judgment declaring him to be a citizen of the United States on the ground that the order of the Maryland Circuit Court vacating its prior order admitting him to citizenship was void because it was not issued in conformity with the requirements of Section 338 of the Nationality Act of 1940 (R. 2-9).

Respondents moved to dismiss the complaint on the ground that it failed to state a cause of action (R. 11), and petitioner moved for summary judgment (R. 20). Petitioner's motion was granted and judgment was entered declaring him "to be a national and citizen of the United States" (R. 20-21).[3]

On appeal by respondents, the Court of Appeals reversed the judgment and remanded the cause with instructions to dismiss the complaint (R. 33).

---

[3] The order further stated that it was "without prejudice to the government's right to institute appropriate proceedings for denaturalization under Sec. 338 of the Nationality Act of 1940 (8 U.S.C. 738)."

DISCUSSION

Petitioner did not in his complaint in the District Court and he does not now (cf. Pet. 6) claim that he did not perpetrate a fraud upon the Maryland Circuit Court when he obtained admission to citizenship on December 2, 1943. His sole contention is that the Circuit Court's order of December 9, 1943, vacating its order of December 2, was null and void because Section 338 of the Nationality Act of 1940 provides the exclusive method whereby a decree admitting an alien to citizenship may be revoked, and, admittedly, the requirements of that section were not satisfied in the proceedings which led to the entry of the order of December 9. The Government's position is that the Maryland court had jurisdiction to vacate its judgment entered a week previously upon the showing made that petitioner procured that judgment by a false oath of allegiance.[4]

1. It has been settled since *Tutun* v. *United States*, 270 U.S. 568, that a naturalization proceeding is judicial in nature and that the resulting

[4] The oath required of applicants for naturalization is prescribed by Section 335 of the Nationality Act, 8 U.S.C. 735 (b): "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God. In acknowledgment whereof I have hereunto affixed my signature."

order is a judgment of the same standing as any other judicial judgment. See also *Schneiderman* v. *United States*, 320 U.S. 118, 123.

It is a well established rule of the common law that courts of record or of general jurisdiction have, under proper circumstances, full control over their orders or judgments during the term at which they are made, and have inherent judicial power, on sufficient cause shown and within their sound discretion, to amend, correct, open, vacate or set aside their own judgments. *Bronson* v. *Schulten*, 104 U.S. 410; *North* v. *Town Real Estate Corp.*, 60 A. 2d 665 (Md. 1948); *Eddy* v. *Summers, et al.*, 183 Md. 683 (1944); *Harvey* v. *Slacum*, 181 Md. 206 (1942). Since the founding of our nation the courts, both state and federal, have used this equitable power, recognized ages before in English jurisprudence, to protect themselves against fraud. *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U.S. 238; *Jackson* v. *Irving Trust Co.*, 311 U.S. 494, 499; *Shelton* v. *Van Kleeck*, 106 U.S. 532; *Whiting* v. *Bank of United States*, 13 Pet. 6, 13-15.

It was a common practice prior to 1906 for naturalization courts, both state and federal, in the exercise of their inherent equitable powers, to vacate, set aside, or cancel naturalization judgments on grounds of fraud. *United States* v. *Mansour*, 170 Fed. 671, 675 (S.D. N.Y.); *United States* v. *Kornmehl*, 89 Fed. 10 (D. N.J.); *United States* v. *Norsch*, 42 Fed. 417 (C.C. E.D. Mo.); *State ex rel. Lacy* v. *Brandhorst*, 156 Mo.

457 (1900); *Tinn* v. *United States District Attorney*, 148 Cal. 773 (1906); see also Ann. Cas. 1914 B, 229-230.

Section 15 of the Nationality Act of 1906, the forerunner of the present Section 338 of the Nationality Act of 1940, was the first express statutory provision for the revocation of an order admitting a person to citizenship. The remedy provided by this statute is not confined to the court in which the alien was naturalized; it enjoins upon the United States Attorney the duty to institute such a proceeding in any court having naturalization jurisdiction in "the judicial district in which the naturalized citizen may reside at the time of bringing the suit." Naturalization courts, both state and federal, have not regarded the enactment of this remedy as depriving them of their equitable powers whenever it was deemed necessary to invoke them to vindicate the integrity of their judgments. Thus, in *Macoluso's Naturalization*, 237 Pa. St. 132, 137-138 (1912), the court rejected the contention that Section 15 of the 1906 act established an exclusive procedure for revoking a naturalization judgment:

> Whatever may be the proper interpretation of the Act of 1906, we think it clear that it does not prevent a State court from controlling its own records in any case in which it has jurisdiction to act. If a State court has authority to naturalize aliens and issue certificates of citizenship, it is not within the power of Con-

> gress to deprive it of its equitable powers to correct any fraud upon, or fraudulent use of, its process. Congress may establish a uniform rule of naturalization, as authorized by the Federal Constitution, but it certainly will not be presumed, in the absence of a declaration to the contrary, that such legislation prevents any court, State or Federal, from annulling a certificate of citizenship bearing its seal which is a forgery. The power to correct and purge its records is inherent in every State court of general jurisdiction, and it may be exercised in the case of the naturalization of an alien as well as in any other case in which it has jurisdiction to act. It, therefore follows that the Act of 1906, relied on by the appellant, did not deprive the court below from entering its decree annulling the forged certificate of citizenship and directing that it be surrendered for cancellation.

More recently, in *Petition of Weltzien*, 68 F. Supp. 1000 (S.D.N.Y.), the court overruled a contention as to the exclusiveness of the statutory cancellation proceeding and upheld its power to vacate a naturalization judgment entered at the same term so as to permit the introduction of newly discovered evidence.

Other courts, in cases not directly involving this question, have interpreted the statutory remedy as not abrogating the traditional power of courts over their judgments, but as providing a new and additional protective measure against fraudulent

and illegal naturalization where other remedies have been foreclosed by the lapse of time and consequent loss of authority to act in the original naturalization proceeding. See *Sourino* v. *United States*, 86 F. 2d 309, 311 (C.A. 5); *United States* v. *Ovens*, 13 F. 2d 376, 377 (C.A. 4) ("The statutory provision [§ 15 of the 1906 act] authorizing the filing of such a bill creates a new remedy, which in some respects is broader than that existing independently of statute");[5] *United States* v. *Aakervik*, 180 Fed. 137, 142-143, 147 (D. Ore.); cf. *United States* v. *Ness*, 245 U.S. 319, 325 ("The remedy afforded by § 15 for setting aside certificates of naturalization is broader than that afforded in equity, independently of statute, to set aside judgments").

The legislative history of the 1906 act, although shedding no light on the question whether the statutory cancellation proceeding was intended to be the exclusive remedy for revoking a naturalization judgment, shows that Congress was cognizant of widespread frauds in naturalization matters and of the then existing practice of naturalization courts to cancel naturalization certificates in the exercise of their inherent power over their judgments. Its primary purpose was to stiffen the requirements for naturalization and tighten the

[5] The court held that the denial by the state naturalization court of the Government's motion in the original naturalization proceeding to cancel the applicant's certificate of naturalization on the ground that it had been illegally procured did not bar a suit for cancellation under § 15 in a federal court.

procedure for granting it as a means of combating fraud. See H. Rep. No. 1789, 59th Cong., 1st sess., pp. 2-3; H. Doc. No. 326, 59th Cong., 2d sess., pp. 131-135. In such a context, it seems to be a fair inference that in adding Section 15 Congress intended to provide a further safeguard against fraudulent or illegal naturalization, without impairing the historic authority of courts over their own judgments.[6]

There is no warrant in the statutory language for an inference that Congress intended to abridge this authority. Section 338 of the 1940 Act, like its predecessor, Section 15 of the 1906 Act, imposes a duty on United States Attorneys to invoke the remedy it provides, without any limit of time. And it provides that a proceeding thereunder shall be brought in the judicial district where the naturalized person resides, which may or may not be the district in which he was naturalized. To hold that this remedy is exclusive would be to divest the courts upon whom frauds may be perpetrated of their inherent power, within the limits of their authority to act in the original proceeding, to rectify such fraud by vacating the judgment which it evoked and would compel them to depend upon the

[6] Cf. the opinion below (R. 30): "* * * the *Macoluso* case was a leading authority of 28 years standing for the very proposition now in issue when Congress in 1940 substantially reenacted section 15 of the 1906 Act. Certainly, had Congress felt that it presented an evil to be rectified, it would have indicated in some way its intention to correct the impression of that case."

United States Attorney of the district where the perpetrator resides to determine whether action should be taken under Section 338. In the absence of express provision to that effect, the presumption is that this section did not abolish the common law remedy, and that the new remedy should be regarded as cumulative rather than exclusive of previous remedies. *Meister* v. *Moore*, 96 U.S. 76; *Hoage* v. *Murch Bros. Const. Co.*, 50 F. 2d 983 (C.A. D.C.); *Macoluso's Naturalization, supra*, at 138.

2. Petitioner relies principally upon a claim of conflict between the decision below and *United States ex rel. Volpe* v. *Jordan*, 161 F. 2d 390 (C.A. 7), and certain decisions in other circuits[7] (Pet. 7-8); he also claims that the decision here is "probably in conflict with applicable decisions of this Court"[8] (Pet. 10-12). We think it is unnecessary to discuss the cases other than *Volpe*, for they did not involve the question presented here and petitioner's own discussion of them shows that they are inapposite.[9]

---

[7] *United States* v. *Watkins*, 168 F. 2d 883 (C.A. 2); *United States* v. *Stabler*, 169 F. 2d 995 (C.A. 3); *United States* v. *Kiriaze*, 172 F. 2d 1000 (C.A. 5); *United States* v. *Sotis*, 131 F. 2d 783 (C.A. 7); *United States ex rel. Harrington* v. *Schlotfeldt*, 136 F. 2d 935 (C.A. 7), certiorari denied, 327 U.S. 781.

[8] *Knauer* v. *United States*, 328 U.S. 654, 657; *Baumgartner* v. *United States*, 322 U.S. 665, 675; *Schneiderman* v. *United States*, 320 U.S. 118, 123, 125; *Maney* v. *United States*, 278 U.S. 17; *United States* v. *Ginsberg*, 243 U.S. 472.

[9] As the court below said (R. 26-27): "* * * * none of the cases cited by him refer to the situation here but rather to a proceeding in which the Government has avowedly sought its

Volpe was admitted to citizenship on March 27, 1920, in the Superior Court for Cook County, Illinois, over the Government's objection. Seven days later, on April 3, 1920, upon an oral *ex parte* application of the United States, and without any notice to Volpe, the court vacated its previous order and restored Volpe's petition for naturalization to the pending calendar. About four years later that petition was dismissed, allegedly upon Volpe's written request. Subsequently, he filed a new petition for naturalization which was denied. Later he was ordered deported. The validity of the deportation order was upheld by the Court of Appeals for the Seventh Circuit,[10] and affirmed by this Court,[11] with neither Court specifically passing on the issue of Volpe's nationality. Thereafter, he filed a motion in the Superior Court for Cook County to expunge from its records the order

---

authority to act from either section 15 of the 1906 Act or section 338 of the current Act. Of course the broad language gleaned from these cases supports the proposition that there must be strict compliance with the statute. There is no question that Congress so intended. But it is self evident that these cases cannot be used as authority on the present question, especially in view of the fact that in none of them does the government contend, even though it may have failed to comply with the statutory conditions for denaturalization, that the authority to proceed as it did could be found elsewhere. Furthermore, as far as we have been able to ascertain, in none of these cases was the attempted denaturalization instituted in the court issuing the naturalization order within the same term that the order was issued, as a part of the original proceeding, rather than as a separate proceeding under the statute."

[10] *United States ex rel. Volpe* v. *Smith*, 62 F. 2d 808 (C.A. 7).

[11] *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422.

vacating the order admitting him to citizenship. This motion was denied on the ground that the court was without jurisdiction to grant it.[12] Finally, he again petitioned for a writ of habeas corpus in the District Court for the Northern District of Illinois. In this petition he assailed the validity of the Superior Court's order revoking his naturalization upon the ground that it was entered in violation of the rules of that court, which required that in every case at least one day's written notice be given to the adverse party before a motion could be heard or an order made, and he had not received any notice of the motion nor was there any notation of such notice to him upon the records of the court.

In reply to the petition, the Government, without denying that Volpe had no notice prior to issuance of the order of revocation, interposed a plea in bar alleging that the question of his alienage had been determined adversely to him in the deportation litigation. The plea was sustained.

On appeal to the Court of Appeals, it was held by a divided court that the trial court improperly sustained the plea in bar because the question of Volpe's alienage was not resolved in the previous litigation, since at that time the courts had "assumed for the purpose of deciding the validity of

[12] On appeal, the denial was affirmed by the Appellate Court of Illinois, *Volpe* v. *United States*, 328 Ill. App. 311, and the Supreme Court of Illinois refused to review the case. 393 Ill. 630.

the deportation proceedings that petitioner was an alien and not a citizen" (161 F. 2d at 392). The court also held that since the prior case was a habeas corpus proceeding the doctrine of *res judicata* was not applicable. Thus, as the court said, the plea in bar, the only matter before the court, was "disposed of in short order" (*ibid.*). But, after pointing out that the case had been "presented and argued on the theory that petitioner's certificate of naturalization was unlawfully vacated and set aside because no notice was given to him in compliance with a rule of the Superior Court of Cook County," the court said that there was "a better, in fact we think a controlling, reason why the allegation that no notice was given presents a triable issue" (pp. 392-393). After adverting to the exclusive power of Congress in the field of naturalization and Section 338 of the Nationality Act, the court said (p. 395):

> * * * As we have shown, a State court when acting in naturalization matters does so as a Federal court or as an agent of the Federal government. It seems plain that when acting in such capacity it cannot depend upon an iota of authority which may stem from its own rules or the State law, whether embodied in statutory provisions or in the decisions of its courts.
>
> The fact that the Superior Court had a rule which provided for the vacation of judgments under certain circumstances can have no ap-

> plication to a denaturalization proceeding because the court when acting in such capacity is bound by the procedure adopted by Congress. Neither do we need to inquire as to the authority of a State court over judgments during the same term at which they were entered. Whatever may be the law as to such judgments generally, it can have no application to a naturalization judgment for the reason that Congress has specifically provided the manner in which such judgment may be revoked or vacated.

The court concluded, therefore, that the Superior Court's order vacating its order admitting Volpe to citizenship "was void if entered; as alleged, without notice to petitioner * * * because under such circumstances it was entered in utter disregard of the manner and procedure prescribed by Congress" (pp. 395-396). The court added that if "we assume, contrary to our holding, that the Federal procedure is inapplicable, we still think the order of April 3, 1920 is void if, as alleged, it was entered without notice as required by the court rule" (p. 396). The judgment remanded the cause "with directions that respondent be permitted to answer the petition and to show if it can that the order of March 27, 1920 admitting petitioner to citizenship has been revoked or cancelled, in conformity with the law as decided herein" (*ibid.*).

The court below said that whether or not this opinion as to the exclusiveness of the statutory remedy expressed in the *Volpe* case was *dictum*, it could not accept that opinion because the court felt it lacked "force as authority for the reason that we believe it is based on a misunderstanding of the effect of a naturalization order as a judgment" (R. 27-28). The court below also noted that the *Volpe* opinion did not "even mention the earlier case of *In re Macoluso's Naturalization*" (*supra*), and added, "As authority therefore, the *Volpe* case stands much weakened in our eyes" (R. 30).

Although we feel strongly that the decision below is correct, in view of the divergent views of the Seventh Circuit and the court below on the sole issue presented here, we hesitate to oppose the petition. The Seventh Circuit's views, however, were *obiter* in nature. And it should be noted that the question is a rather novel one, as evidenced by the fact that in the 45 years since the statutory cancellation proceeding has been in effect there have been only four reported decisions which deal directly with the exclusiveness *vel non* of that remedy (i.e., *Macoluso, Weltzien, Volpe, supra*, and the instant case). The paucity of decisions on the question of the power of a naturalization court over its own judgment during the term, indicates, we believe, that the issue rarely arises and is not of general importance. This may

perhaps be due to the elaborate administrative pre-examination procedures now in use and the consequent weeding out of unqualified applicants for citizenship, with the result that fraud or illegality is not discovered until after the naturalization court has lost jurisdiction in the original proceeding and the only remedy available is the statutory denaturalization proceeding.

In these circumstances, the Court may conclude that there is no imperative necessity for review here to consider the divergent views of the Seventh Circuit and the court below.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
ROBERT S. ERDAHL,
EDWARD S. SZUKELEWICZ,
Attorneys.

APRIL 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE 1951 940921 728